ORIGINAL

88-1750

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

S/S SALVADOR, her engines, boilers, etc.,
and A/S IVARANS REDERI,

Petitioners,

against

BERISFORD METALS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals fully considered and correctly decided, based upon established practices of international trade, the Congressional intent in the enactment of the Carriage of Goods by Sea Act, 46 U.S.C. §1300, *et seq.*, (hereinafter COGSA) and an unbroken line of authority, that an ocean carrier which falsely issues an on-board bill of lading for 100 bundles of tin ingots upon which the consignee relied in good faith, is denied the benefit of the package limitation contained in COGSA, 46 U.S.C. 1304(5) with respect to 70 bundles that were not loaded aboard.[1]

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[1] The Court of Appeals did not "set aside" §1304(5), as imputed to it by petitioner (Petition, page i). It merely found the section inapplicable to the facts in this case.

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Statement Pursuant to Supreme Court Rule 28.1

Respondent, Berisford Metals Corporation, is a wholly-owned subsidiary of S&W Berisford PLC of London, England. S&W Berisford has a large number of subsidiaries worldwide. Most, however, are wholly-owned and therefore need not be disclosed according to the office of the Clerk of this Court. The remaining co-subsidiaries (with locations of main offices) are:

Berisford Malaysia Sdn Bhd	Kuala Lumpur, Malaysia
J.H. Rayner Espana S.A.	Madrid, Spain
Sociedade Esportadora e Importadora "Cetoma" Ltda.	Rio de Janeiro, Brazil
North Solomons Plantation Development Corp Pty. Ltd.	Papua, New Guinea
Kopi International Holdings Pty. Ltd.	Papua, New Guinea
Rayner Golbin Pty. Ltd.	Silverwater, Australia
Tradeco Holdings Ltd.	New York, New York
W.H. Wardle (Metals) Ltd.	Shropshire, England
Berisford Espana S.A.	Muria, Spain
Castlebar Bacon Co. Ltd.	Castlebar, Ireland
Kilsern Distillers Ltd.	Leicester, England
Capital Wine & Travers Ltd.	Leicester, England
Ketlon (U.K.) Ltd.	Paddock Wood, Kent, England
Wickman Bennett Machine Tool Inc.	Warwick, Rhode Island
Wickman Exeter Ltd.	Birmingham, England
Berisford Cresvale Ltd.	London, England
Cresvale International Inc.	New York, New York

Berisford Mocatta Ltd.	London, England
Albion Trust Ltd.	London, England
Craneheath Securities Ltd.	London, England

Respondent itself has no subsidiaries which are not wholly-owned by it.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Berisford Metals Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case.

REASONS WHY THE WRIT SHOULD BE DENIED

In opposing the petition herein, we do not presume or attempt to articulate any better or with any more force the traditional principles of admiralty law as expressed in the clear and reasoned decision herein of the Second Circuit. It fully considered and correctly decided the issues. However, we feel that certain points raised by petitioners, albeit belatedly,[2] should be addressed merely to support a denial of the petition.

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[2] Point I of the Petition was first raised on the petition for rehearing to the Second Circuit.

POINT I

Petitioners' arguments are based upon inapplicable considerations or false premises and are without merit.

A. Opinion below concerned interpretation of statute not treaty.

Under Point I of its argument, petitioners contend that the judgment of the Court of Appeals stems from one radical error, *i.e.*, it failed to give effect to a treaty entitled "International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading" (the "Hague Rules"), which was ratified by the United States in 1937. The court, however, was not faced with interpreting or giving effect to the treaty but rather with the United States COGSA and decisions of the American courts,[3] both before and after its enactment, concerning the admiralty concept of deviation and the impact on an ocean carrier's liability when it issues a false on-board bill of lading upon which there is reliance.

While it is true that the treaty sought to unify certain rules relating to ocean bills of lading among the various signatories, it was not adopted verbatim into American law. It was implemented by enactment of the United States COGSA but with the understanding that should

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[3] *St. John's N.F. Shipping Corp. v. Companhia Geral, etc.*, 263 U.S. 119 (1923); *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 47 F.2d 878 (2d Cir. 1931), *cert. denied*, 283 U.S. 856; *The Carso*, 53 F.2d 374 (2d Cir. 1931); *General Foods Corp. v. The Felipe Camaro*, 172 F.2d 131 (2d Cir. 1949); *Searoad Shipping Co. v. E.I. Dupont*, 361 F.2d 833 (5th Cir.), *cert. denied*, 385 U.S. 973 (1966); *Portland Fish Co. v. States SS Co.*, 510 F.2d 628 (9th Cir. 1974); *Miles Metal Corp. v. M.S. Havjo*, 494 F.2d 563 (2d Cir. 1974); *Spartus Corp. v. SS Yafo*, 590 F.2d 1310 (5th Cir. 1979); *Elgie v. S.S.S.A. Nederburg*, 599 F.2d 1177 (2d Cir. 1979), *cert. denied*, 444 U.S. 1072; *Calmaquip Engineering Corp. v. West Coast Carriers Ltd.*, 650 F.2d 633 (9th Cir. 1981).

any conflict arise between the provisions of the Convention and the provisions of COGSA, the latter shall prevail. (Petition appendix page 35a footnote; 51 Stat. 233).

No country has a statute exactly like the U.S. COGSA which statute, Congress has said with all possible clarity, is to apply. Gilmore and Black, *The Law of Admiralty*, 2d edition, page 145, footnote 23.

Furthermore, the Act specifically left intact and with continuing full force and effect, its 1893 forerunner, the Harter Act, 46 U.S.C. §190, *et seq.*, and the Pomerene Bills of Lading Act, 49 U.S.C. §41, *et seq.*, and it is universal practice to cite Harter cases to COGSA points, where applicable. *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628, 631 n. 3 (9th Cir. 1974).

Harter's purpose was to remedy abuses which had arisen through efforts of shipowners engaged in common carriage to limit unreasonably their obligations as carriers of goods. *Koppers Connecticut Coke Company v. James McWilliams Blue Line*, 89 F.2d 865 (2d Cir. 1937), *cert. denied*, 302 U.S. 706; *The Willdomino*, 300 Fed.5 (3d Cir. 1924), *affirmed*, 272 U.S. 718.

The enactment by Congress in 1916 of the Pomerene Act was to insure the integrity of bills of lading as instruments of commerce. In construing its constitutionality, this Court stated in *U.S. v. Ferger*, 250 U.S. 199 (1919), 204-205:

> That bills of lading for the movement of interstate commerce are instrumentalities of that commerce which Congress under its power to regulate commerce has the authority to deal with and provide for is too clear for anything but statement, as manifested not only by that which is concluded by prior decisions, but also by the exertion of the power of Congress. * * * That as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the

> flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, *both domestic and foreign,* largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in *domestic and foreign exchange,* is also so certain and well known that we may notice it without proof. (Emphasis added).

Thus, the Court of Appeals in this instance did not stray from but rather was consistent in following the course that has been purposely set by Congressional enactments and the rule of *stare decisis,* in upholding the principle that

> A negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involved in the sale and transportation of goods between parties located at a distance from one another. (Petition appendix page 9a)

Indeed, as petitioners' co-counsel so aptly observed in another context:

> One of the great objectives of both Acts (Harter and COGSA) is to prevent the impairment of the value and negotiability of the ocean bill of lading. Gilmore and Black, *supra,* 145-146.

If it was the intent of Congress to abolish the extensive body of pre-COGSA statutory and common law regarding ocean bills of lading then it was inconsistent in specifically reserving in the Act the continuing force and effect of both Harter and Pomerene.

Petitioners are critical of the seminal decision in *Jones v. Flying Clipper,* 116 F. Supp. 386 (S.D.N.Y. 1953) by District Judge Edward Weinfeld, which has been cited with approval or relied on in numerous decisions of both circuit and district courts. *Spartus Corp. v. S.S. Yafo, supra,* 590 F.2d 1316-1317. Faced with the identical issue as here, *i.e.,* whether the adoption of COGSA superseded or overrode the then existing body of law regarding the consequence of ocean carrier deviation, Judge Weinfeld found nothing in the legislative history of the Act to indicate that Congress, by fixing the package limitation at $500.00, intended to displace the doctrine of unjustifiable deviation which was so firmly entrenched in maritime law. In arriving at its conclusion, the district court traced the Congressional history of the Act[4] and found expression of legislative intent in the following statement of then Senator White, one of the Act's leading advocates:

> The legislation supersedes the so-called 'Harter Act' from the time the goods are loaded on the ship to the time they are discharged from the ship. *Otherwise, our law remains precisely as it is, unaffected and unimpaired by the proposed legislation.* (Emphasis added)

116 F. Supp. 389, footnote 11.

The *Jones* decision found additional support in the holding of *Stag Line, Ltd. v. Foscolo, Mango & Co., Ltd., (The Ixia),* 1932 Appeal Cases 328, wherein the House of Lords held that the English Act of 1924, the equivalent of the American COGSA, did not alter the substantive English law that theretofore prevailed regarding carrier deviation which deprived the ship of protection of exceptions in its bill of lading.

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[4] In *Atlantic Mutual Insurance Co. v. Poseidon, etc.,* 313 F.2d 872 (7th Cir. 1963), *cert. denied,* 375 U.S. 819, the Seventh Circuit apparently did not consider the history or Congressional intent underlying the Act.

Petitioners concede (Petition page 12, footnote 8) that even the domestic laws of France and Scandinavia have limited the effect of the Hague Rules regarding package limitation where the carrier has been guilty of fraud or intentional misconduct.

Thus, the signatories to the Hague Convention, including the United States, have reserved by their own enactments or preserved their own rules of law regarding carrier deviation that existed prior to the Convention. Clearly, the "uniformity" regarding the consequences of ocean carrier deviation which petitioners so arduously press the Court to enact, has not been accepted by the other maritime nations.

B. Carrier's misconduct vitiated bill of lading including package limitation clause

Petitioners' argument under Point II is grounded upon the equities existing between the shipper and the carrier, *i.e.*, each does or should rely on the limitation contained in the bill of lading. But this begs the question, since such a fundamental breach going to the essence of the carrier's contract as we have here, results in no contract and all of its terms are vitiated. *Jones v. Flying Clipper, supra,* 338; and the carrier thereby loses the benefit of the defenses and limitations inserted in the bill of lading for its benefit. *The St. John's N.F. Shipping Corporation v. S.A. Companhia Geral, etc., supra.*

As early as 1907, the Ninth Circuit in *Pacific Coast Co. v. Yukon Independent Transportation Co.,* 155 Fed. 29, 33-34, held that an ocean carrier's deviation denied to it bill of lading clauses inserted in its favor. It quoted with approval the following language which is equally appropriate and to the point in the instant case:

> "It is unnecessary to say that if, under the circumstances of a particular case, the stipulation were unreasonable or worked a manifest injustice to the libelants, we should not give it effect."

* * *

> For this reason the courts are compelled, when called upon to enforce them, to construe such contracts fairly, and to reject stipulations which are unreasonable, and to deny carriers all unfair advantages claimed by reason of exemptions from liability for negligence or *plain violation of the carrier's obligation.* In order to give a fair construction to a contract, all its parts must be considered, and conditions and circumstances which the evidence proves were known to the parties and contemplated by them in making it. (Emphasis added)

* * *

> In construing bills of lading, as in construing other commercial instruments, it is the right and duty of the court to look, not only to the language employed, but to the subject-matter and to the surrounding circumstances, in order to determine the proper effect of the language used, by putting itself so far as possible in the place of the contracting parties.

Here, the subject matter was 3,000 tin ingots for which Berisford paid $663,000.00 in reliance on petitioners' representation, *i.e.*, warranty, that they *had loaded* the goods aboard the vessel in fulfillment of their statutory and contractual obligation. In fact, 2100 ingots, although received by petitioner Ivarans, never were loaded. It would be difficult to imagine a more classic example of a fundamental breach going to the essence of the contract as found by the Court of Appeals. Petitioners would have the courts completely ignore the surrounding circumstances leading up to the issuance of the bill of lading and give rigid and unswerving effect to a clause therein beneficial only to the carrier, when its own misconduct vitiated the same contract it seeks to enforce.

Petitioners' protest of disproportionality and inequity rings hollow in face of the fact that it received goods worth over $475,000.00 and then failed to account for them before representing that they had been loaded aboard. To accept petitioners' argument would be to invite rampant fraud or mischief on the part of the carriers. They would be secure in the knowledge that once having received a shipment for carriage worth many times in excess of the package limitation, they could with impunity dispose of the goods or fail to account for them *before* loading and then respond merely for the package limitation. Under this scenario, the disproportionality against cargo interests is self-evident and reliance on on-board bills of lading by the international trade community would come to a standstill.

The Second Circuit emphasized that a false bill of lading, with respect to loading of cargo, would adversely impact on trade and subvert reliance thereon as an essential method of facilitating such trade. Breaking the limitation in "a few odd cases," say petitioners, will not contribute to this confidence but we disagree. It reassures both carrier and cargo interests that the law continues to uphold the integrity of such bills as negotiable documents and that it will not countenance their use being undermined by a carrier's false representation relating to its own conduct.

C. Intermodal system of carriage is not involved.

Under Point III, petitioners voice concern as to the harmful consequences that might flow regarding a multimodal transportation system, if the decision below is upheld. However, their fears are ill-founded since containers are not involved here except insofar as the carrier used them for its own convenience. The shipper delivered 100 pallets in breakbulk (*i.e.*, non-containerized) condition to the carrier at Santos and the bill of lading represents that 100 pallets, not containers, were loaded on board.

The Ninth Circuit considered and rejected the very same argument in *Portland Fish Company v. States Steamship Company*, 510 F.2d 628 (1974), *rehearing denied*, 634, which also involved a breakbulk shipment. Paradoxically, petitioners have quoted the very portion of the Court's opinion dealing with this issue, at page 21 of their petition.

Petitioners assert (Petition page 16) that the opinion below:

> indicates that the guarantee (of receipt of quantity) will apply even to cargo received by the carrier in sealed ocean containers.

This is simply not so as revealed by a fair reading of the opinion (Petition appendix page 16a.):

> Defendants cannot escape responsibility on the ground that the four containers into which it claims that it had placed the bundles after receipt from the shipper were locked and sealed at the time when the containers were loaded aboard its ship, the SS SALVADOR. It is undisputed that the defendant received from the shipper the 100 separate bundles and that for its own convenience it placed them in the four containers. It was thereafter responsible for verifying the contents before loading the containers and issuing a clean on-board bill of lading.

POINT II

The issues raised do not warrant review by this Court.

Inasmuch as the decision below turns upon its peculiar facts and involves the rare instance where an ocean carrier receives a breakbulk shipment and then issues an on-board bill of lading which misrepresents the quantity loaded and upon which there is reliance, the issues presented are of little importance to other than the litigants and do not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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